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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 507

RECONSTRUCTION FINANCE CORPORATION,
PETITIONER
v.
LUSTRON CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Reconstruction Finance Corporation, prays that a writ of certiorari issue to review the judgments of the Court of Appeals for the Seventh Circuit, entered in the above-entitled case on October 23, 1950.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (R. 549) is reported at 184 F. 2d ~~782~~ 289. The case involves orders in a bankruptcy proceeding entered by the district court (R. 11, 128, 135, 140, 151, 196, 197, 203, 515) without opinion.

JURISDICTION

The judgments of the Court of Appeals for the Seventh Circuit were entered on October 23, 1950 (R. 558, 559). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

In a suit in the United States District Court for the Southern District of Ohio to enforce liens securing an indebtedness of more than $36,500,000, the Reconstruction Finance Corporation requested the appointment of a receiver for the mortgaged property and extension of the receivership to all the debtor's property. The debtor's principal place of business and all its assets are located in Ohio. A receiver was appointed as requested and the receivership was administered under the supervision of the Ohio court almost to the point of completion. On the day prior to the hearing on confirmation of judicial sales of the debtor's property, bankruptcy proceedings were instituted in the United States District Court for the Northern District of Illinois, the state in which the debtor was incorporated. The Illinois court, without imposing a restraint on the Ohio court, attempted to stay the receivership proceedings by enjoining R. F. C., the receiver, and their agents from taking fur-

ther action in the Ohio proceeding. On its own motion, the Ohio court nevertheless proceeded to confirm the sales and direct that they be consummated. The Illinois court denied a motion by R. F. C. to transfer the bankruptcy proceeding to the Ohio court. Ultimately, the Illinois court enjoined R. F. C., which had bid in the mortgaged assets, from accepting possession of, or title to, the property, and the Ohio court directed the marshal to deliver custody and control of the property to R. F. C. The orders of the Ohio court were not appealed. The orders of the Illinois court were affirmed by the court below.

The questions presented are:

1. Whether a federal district court in which a petition for bankruptcy has been filed has power to transfer the proceeding to another district court in which a bankruptcy proceeding is not then pending, and whether, in the circumstances of this case, the Illinois court was obliged on appropriate motion to transfer the bankruptcy proceeding to the Ohio court in which the receivership was being administered.

2. Whether a bankruptcy court, in ordinary bankruptcy proceedings, has authority to enjoin proceedings for the foreclosure of a lien in another federal district court where the foreclosure suit was commenced before bankruptcy and the lien was acquired more than four months before bankruptcy.

STATUTES INVOLVED

Section 1 of the Bankruptcy Act (11 U. S. C. 1) provides as follows:

> The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:
>
> * * * * *
>
> (10) "Courts of bankruptcy" shall include the district courts of the United States and of the Territories and possessions to which this Act is or may hereafter be applicable, and the District Court of the United States for the District of Columbia;
>
> * * * * *

Section 2 of the Bankruptcy Act (11 U. S. C. 11) provides as follows:

> a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—
>
> * * * * *

(19) Transfer cases to other courts of bankruptcy;

* * * * *

28 U. S. C. 1404 (a) provides as follows:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT

This case arises out of a bankruptcy proceeding instituted with respect to Lustron Corporation in the United States District Court for the Northern District of Illinois at a time when a foreclosure and receivership proceeding pending in the United States District Court for the Southern District of Ohio was on the verge of being consummated. Without enjoining Judge Underwood in Ohio from taking any action, Judge Sullivan in Illinois attempted to restrain further proceedings in the Ohio court on the eve of its confirmation of judicial sales previously made in the administration of the foreclosure receivership. On Judge Underwood's own motion, the sales were nevertheless confirmed and court officers were directed to give title and possession to the purchasers. No appeals were taken from these orders. The Illinois court denied motions of Reconstruction Finance Corporation, which was the principal secured and unsecured

creditor of the bankrupt and the plaintiff in the foreclosure proceedings, (1) to dissolve its injunctional orders, and (2) to transfer the cause to the Ohio court. The denial of these motions by the Illinois court was affirmed on appeal by the court below. As a result of the divergent assertions of jurisdiction by the Ohio and Illinois courts there are now outstanding an unappealed order of the Ohio court, subject to the appellate jurisdiction of the Court of Appeals for the Sixth Circuit, and an order of the Illinois court, affirmed by the Court of Appeals for the Seventh Circuit, which require the accomplishment of opposite results.[1]

a. *Proceedings prior to bankruptcy (February 21, 1950—June 8, 1950).*—Lustron is an Illinois Corporation (R. 2). Its principal place of business and all its property are located in Ohio (R. 16). On February 21, 1950, R. F. C. filed in the Ohio district court a complaint against Lustron to foreclose certain mortgages covering chattels and certain pledges and assignments of intangibles, executed and delivered by Lustron many months previously, to secure loans aggregating in excess of $36,000,000 made by R. F. C. to Lustron (R. 284, 288–313). The complaint also sought the appointment of a receiver for the

[1] The petition for a writ of certiorari in *Lafayette Steel Co., Inc.* v. *Lustron Corp.*, No. 472, this Term, arises out of the same bankruptcy proceeding.

mortgaged property and the extension of the receivership to include all other property of Lustron (R. 311).

On March 6, the Ohio court entered judgment (R. 284, 314) against Lustron for $36,593,969.63 on the indebtedness due R. F. C., ordered a foreclosure decree to be presented, and appointed a receiver who took possession of all of Lustron's property both mortgaged and unmortgaged (R. 284, 314, 315–320). On March 30, the Ohio court entered a foreclosure decree, as of March 6, with respect to the mortgaged property (R. 285, 321–338).

On May 5, the Ohio court entered an order of sale upon its foreclosure decree, directing the United States Marshal to conduct the sale of the mortgaged property on June 6, at 11:00 A. M. (R. 285, 341–353). The order of sale required a deposit of $100,000 to be made at the time of the bid and provided that the full balance of the purchase price be paid to the marshal within three days from the date of confirmation of such sale by the court, and that on failure to make such payment "the purchaser shall be adjudged in contempt of court." It also provided that upon confirmation of the sale and receipt of the purchase price, the marshal should convey title and deliver possession to such purchaser. (R. 350–352.)

Upon the receiver's petition for instructions relative to the unmortgaged property, the Ohio

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court, on May 10, directed that a hearing be held on May 17, upon notice by mail to all known creditors of Lustron (R. 374). On May 17, after hearing, the Ohio court entered an order of sale directing the receiver to conduct a sale of certain unmortgaged property, at 1:00 P. M. on June 6 (R. 375–379).

At the marshal's sale of the mortgaged property, on June 6 at Columbus, Ohio, the marshal publicly sold and struck off the mortgaged property to R. F. C. for $6,000,000, and R. F. C. made the deposit required under the order of sale (R. 364). On the same day, R. F. C. filed a motion, returnable on June 9 before the Ohio court, asking confirmation of the sale of the mortgaged property (R. 286).

At the receiver's sale of the unmortgaged assets, on June 6 at Columbus, Ohio, the receiver sold certain of the unmortgaged property to Lafayette Steel Company, Inc., for $645,000 (R. 380). The receiver filed a similar motion on that day, also returnable on June 9 before the Ohio court, for confirmation of his sale to Lafayette Steel Company, Inc. (R. 20).

b. *Intervention of bankruptcy proceedings (June 8, 1950).*—At this stage of the proceedings in the Ohio court, petitioning creditors, asserting claims aggregating $4,842.28, filed in the Illinois district court, on June 8, 1950, a petition in bankruptcy against Lustron (R. 2–4), and a petition

for the appointment of a receiver (R. 6–10). The latter petition described the proceedings seeking "primarily, the foreclosure of liens" brought by R. F. C. in the Ohio court, the appointment of the Ohio receiver, the possession by the receiver of all of Lustron's assets "both pledged and unpledged," the conduct of a judicial sale on June 6 pursuant to orders of the Ohio court, and the motions for confirmation of the judicial sales returnable before the Ohio court on June 9 at 2:00 P. M. The petition asked for the appointment of a receiver "to take charge of all assets belonging to this estate and to institute ancillary action if necessary, to assist in taking possession of all of the assets belonging to this estate wheresoever located," and for the entry of a restraining order, without notice, prior to confirmation of the judicial sales, enjoining R. F. C. and the Ohio receiver from taking any further action in the Ohio action or in the administration of the Ohio receivership.

On the evening of June 8, Judge Sullivan of the Illinois district court, without notice, entered a restraining order enjoining R. F. C. and the Ohio receiver from taking any further action in the Ohio case, or in the administration of the Ohio receivership, for the enforcement of any lien against property belonging to Lustron, and "from entering any order confirming or approving" the judicial sales or requesting the approval of such sales (R. 11–13).

Counsel for the Illinois petitioning creditors then went to Columbus, Ohio, and there, on June 9, handed to counsel for R. F. C. and the Ohio receiver copies of this restraining order (R. 20, 172). At the hearing before the Ohio court at 2:00 o'clock on that day, on the motions for confirmation and on Lustron's motions for denial of confirmation (R. 286), counsel for R. F. C. and counsel for the Ohio receiver informed the Ohio court of the entry of the restraining order by the Illinois court on June 8, and of their consequent inability to proceed with their respective motions for confirmation (R. 20).

c. *The conflicting orders of the Ohio and Illinois District Courts (June 9, 1950–July 11, 1950).*—Thereafter, on Monday, June 12, R. F. C. filed in the Illinois court its motion for dissolution of the restraining order of June 8, setting forth in detail the proceedings theretofore had in the receivership proceeding in the Ohio court (R. 16–22). The Illinois court continued to June 13, R. F. C.'s motion for dissolution and the motion of the petitioning creditors for the appointment of a receiver in bankruptcy (R. 23).

On the same day, June 12, the Ohio court entered orders confirming the sale of the mortgaged property by the marshal to R. F. C. (R. 365–366) and the sale by the receiver of certain of the unmortgaged property to Lafayette Steel Company, Inc. (R. 391–392). The order with respect to the mortgaged property provided that,

upon payment of the purchase price the marshal should deliver instruments of conveyance and possession, subject to custody of the property by the Ohio receiver until June 15 at 12:00 noon (R. 366).

When R. F. C.'s motion for dissolution came before the Illinois court on June 13, R. F. C. moved to transfer the case to the bankruptcy court in Ohio, pursuant to Section 2a (19) of the Bankruptcy Act, and objected to the appointment of receivers (R. 26, 42–47). The Illinois court (a) denied R. F. C.'s motion to transfer the case to the Ohio court,[2] (b) entered its adjudication in bankruptcy, with Lustron's consent (R. 14, 32–33, 128–129), (c) referred generally to the referee, for hearing, R. F. C.'s motion for dissolution of the restraining order, and (d) entered an order appointing receivers (R. 32, 128–129, 130–131).

In Ohio, on June 14, in compliance with the order of sale (R. 351) and order of confirmation

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[2] On June 19 and 20, the Illinois court again denied R. F. C.'s motion to transfer the case to the court in Ohio (R. 81–82, 143, 151–152). On June 21, the petitioning creditors moved to vacate the order denying transfer on the ground that it had been entered before answers had been filed, and the Illinois court continued the motion to June 27 (R. 125–126, 158). On June 27, the Illinois court entered a draft order presented by the petitioning creditors vacating the order of June 20, which had denied R. F. C.'s motion to transfer, and denying R. F. C.'s motion to transfer "to become effective as and of this date" (R. 196–197, 393–395).

entered by the Ohio court on June 12 (R. 365–366), R. F. C. completed payment to the marshal of the price for the mortgaged property, and the marshal executed and delivered to R. F. C. a bill of sale and assignment covering the property purchased by R. F. C. at the marshal's sale (R. 367, 368–370).

On the same day, June 14, the bankruptcy receivers presented to the Illinois court a petition referring to the entry by the Ohio court of the order of confirmation, and requesting the Illinois court to enter an order enjoining R. F. C. from taking any action "with regard to the enforcement of any liens which it may have upon" Lustron's assets, "and from taking possession of or accepting title to" any such assets (R. 132–134, 52–55). R. F. C. asked for time to file an answer to such petition, and requested that the matter be set down for hearing on such petition and answer (R. 71). The Illinois court refused leave, and R. F. C. thereupon moved that its motion for dissolution of the restraining order of June 8 stand as its answer to the petition for injunction (R. 71). The Illinois court allowed that motion and at the same time entered the injunctional order requested by the receivers, specifically ordering R. F. C. not to take possession of or title to any of Lustron's assets (R. 71, 155, 135–136).

On June 16, the Illinois court entered an order extending until June 28 the general restraining

order of June 8 (*supra*, p. 9) and set the matter down for hearing on June 27 (R. 140–141).

Meanwhile, the Ohio court entered an order on the same day, June 16, in which it recited that in compliance with its order of June 12 the marshal had transferred title to the mortgaged property to R. F. C., that R. F. C. had taken possession of the property on June 14, and that by the terms of its confirmation order the receiver was required to deliver custody of the property to R. F. C. on June 15 at 12:00 noon (R. 371–372). The order went on to recite "that all of the orders heretofore entered by this Court are valid and subsisting orders entered by this Court in the proper exercise of its proper legal jurisdiction and that said orders are unreversed and unmodified by orders or decrees of any court of competent or superior jurisdiction" (R. 372). The Ohio court then referred to the "purported restraining order" issued against its receiver by the Illinois court, asserted that "this Court has the right and duty to enforce its orders," and directed the marshal to divest the receiver of, and forthwith deliver to R. F. C., custody and control of the property purchased by R. F. C. (R. 372). In accordance with this order, the marshal, on June 16 at 1:30 p. m., divested the Ohio receiver of such custody and control, and transferred and delivered to R. F. C. all custody and control of said property (R. 373).

On June 23, the bankruptcy receivers and the petitioning creditors filed their respective answers in the Illinois court (R. 160–167, 168–176) to R. F. C.'s motion for dissolution of the restraining order of June 8. At the hearing before the referee on June 27, R. F. C. offered in evidence certified copies of the docket entries, from February 21 to and including June 16, in the proceeding in the Ohio court, and various pleadings, documents, decrees, and orders filed and entered in that case (R. 206–271, 242–244). The receivers and petitioning creditors offered no proof in support of any averments made by them in their petition and answers. At the conclusion of the hearing, the referee stated he would enter an order denying R. F. C.'s motion for dissolution and entered such an order the following day, which was affirmed by Judge Sullivan on June 30 (R. 433, 515–517).

On June 28, the Illinois court extended the restraining order of June 8, which had previously been extended to June 28, until June 30 (R. 409, 197). On June 30, the Illinois court entered an order continuing the restraining order "in full force and effect until the further order of" that court (R. 203–204).

On June 30, R. F. C. filed with the referee its proof of claim (R. 468–509) for $32,120,098.97, the amount due from Lustron after crediting on its indebtedness the amount of the purchase price

of the property purchased by R. F. C. at the marshal's sale, on June 6, in the Ohio proceeding, and claimed priority with respect to $16,680,749.55 of the amount of this claim (R. 468–509).[3] R. F. C. also sought, before the Illinois court (R. 464–467) and before the referee (R. 278–279, 280), a stay of the first meeting of creditors scheduled for June 30, or, in the alternative, a postponement of the election of a trustee in bankruptcy, pending the determination of its appeal to the court below which had theretofore been taken on June 23 (R. 179–180). The Illinois court and the referee successively denied such motions (R. 509–510, 279, 280). At the first meeting of creditors held on June 30 (R. 277–282), over R. F. C.'s objections, trustees were elected who have since qualified (R. 280, 510, 514–515).

On July 11, upon the petition of the trustees in bankruptcy (R. 517–520), and over R. F. C.'s objections (R. 461–463), the Illinois court entered an order authorizing the employment of one of the attorneys for the petitioning creditors as special counsel for the trustees, in the matter of the pending appeals and "in the matter of

[3] The claim of priority was made pursuant to Section 64a (5) of the Bankruptcy Act, Section 3466 of the Revised Statutes, and Section 3a of the Reconstruction Finance Corporation Act, as amended. *Bell* v. *Reconstruction Finance Corporation*, 174 F. 2d 145 (C. A. 7).

contesting lien claims against the property of the bankrupt" (R. 521).

d. *Proceedings in the Court of Appeals for the Seventh Circuit.*—During the pendency of the appeal, R. F. C. filed an emergency motion in the court below for a modification of the restraining order of June 8. On August 1, the court below entered an Order of Modification effective until its further order (R. 547–548). This order modified the restraints imposed upon the Ohio court receiver by the Illinois court to permit him, subject to the orders of the Ohio court, to pay and discharge, where necessary, employees in his employ, to pay receivership expenses, to deliver specified types of fabricated products and parts, to collect accounts payable, to maintain accounting records, to protect and conserve property in his possession, to pay for these services, and to retain and replace, as called for, employees necessary to carry out the modified order (R. 547–548). The order stayed the trustees in bankruptcy appointed by the Illinois court from attempting to take possession of any of the property in the possession of R. F. C. or of the Ohio receiver located within the territorial limits of the Ohio court and from attempting to take possession of the books and records of Lustron Corporation (R. 548).

On the appeal, the court below affirmed the district court's injunctional orders, as modified,

and the order refusing to transfer the cause (R. 549). It remanded the disposition of its own modifying order to the discretion of the Illinois district court (R. 557).

The court held that a bankruptcy court has power to enjoin lien foreclosure proceedings in another court, although the liens were acquired more than four months prior to the institution of bankruptcy and the foreclosure proceeding was begun some months before bankruptcy, in order to permit inquiry as to the validity of the liens being foreclosed in the other jurisdiction (R. 551–555). It upheld the order denying transfer of the cause to Ohio on the ground (1) that no power existed to transfer the cause to the Ohio court in the absence of a pending bankruptcy proceeding there, and (2) that if the power to transfer existed there was no abuse of discretion in refusing to make the transfer (R. 555–556).

REASONS FOR GRANTING THE WRIT

The judgment below should be reviewed for the following reasons: (1) The court's decision perpetuates an outstanding conflict with respect to the same subject matter between the unappealed order of the Ohio district court in the Sixth Circuit and orders of the Illinois district court in the Seventh Circuit. (2) It interprets an important provision of the Bankruptcy Act relating to transferability of causes in a manner

incompatible with the statute's language and inharmoniously with the interpretation by another court of appeals of a comparable provision in the Bankruptcy Act. (3) It conflicts with a long line of decisions of this Court and of other courts of appeals holding that bankruptcy courts have no power to stay proceedings pending in other courts for the enforcement of liens acquired more than four months prior to the institution of bankruptcy proceedings.

1. In the interests of the orderly administration of justice, this Court should point the way out of the legal morass into which the conflicting orders of the Ohio and Illinois federal district courts have plunged the assets of the Lustron Corporation. The venture of Lustron Corporation in the manufacture and sale of prefabricated houses, financed almost entirely with government funds supplied through the Reconstruction Finance Corporation, is well known. The Government's determination to enforce Lustron's defaulted liability and the steps taken in the Ohio court both reflected and evoked large public interest. The belated intervention of the Illinois proceedings, on the eve of the consummation of the Ohio suit, has resulted in a legal impasse uncommon in civil litigation of the importance and public concern of this one.

As the Statement indicates, proceedings had been instituted in Ohio by the R. F. C., on

February 21, 1950, to foreclose liens securing loans in excess of $36,500,000, to obtain the appointment of a receiver of the mortgaged property, and to extend the receivership to all the property of Lustron (R. 288–312). Separate sales of the secured and unsecured property of Lustron had been held pursuant to orders of the Ohio court and the property struck off to the highest bidders. R. F. C. bid in the secured property and Lafayette Steel Company the unsecured property. Hearings on the confirmation of these sales had been set for June 9.

On the evening of June 8, the involuntary petition in bankruptcy was filed in Illinois and the Illinois court, without notice, restrained the Ohio receiver, R. F. C., and their agents from taking further steps in connection with the foreclosure of R. F. C.'s liens. At the time set for the hearing on confirmation of the judicial sales on June 9, the Ohio court was advised of the restraints imposed by the Illinois court. The Illinois court had sought to impose no restraint upon the Ohio court itself, and the Ohio court, on its own motion, on June 12, confirmed the foreclosure sale of the mortgaged assets, as well as the receiver's sale of certain unmortgaged assets, and directed the receiver to deliver custody of the mortgaged property to R. F. C. on June 15 (R. 365, 391). To avoid the effect of the confirmation orders of the Ohio court, the Illi-

nois court on June 14 enjoined the R. F. C. "from taking possession of or accepting title to any of the property or assets of Lustron Corporation" (R. 136). The Ohio court responded to the Illinois court's order of June 14 with its own order of June 16, which took specific cognizance of "the purported restraining order" issued against the Ohio receiver, asserted the validity and continued vitality of its own prior orders, and directed the marshal to divest the receiver of custody of the mortgaged property "and forthwith deliver all such custody, authority, right and control over said property, to the purchaser, Reconstruction Finance Corporation" (R. 372).

None of the orders of the Ohio court were appealed. The orders of the Illinois court were appealed to, and affirmed by, the court below. As a result of the concurrent proceedings in the two federal district courts, there are now outstanding two unreversed orders, in different judicial circuits, directing that opposite things be done. By one order, a United States marshal is directed to deliver custody and control of property to R. F. C. By the other, R. F. C. is enjoined from taking possession of, or accepting title to, the same property. Exercise of the supervisory jurisdiction of this Court is called for to resolve a conflict of this type, in a matter of such public interest and importance.

2. The question of the transferability of bankruptcy proceedings to other district courts, whether or not bankruptcy petitions are pending in such courts, has never been decided by this Court. Its importance would seem demonstrated by the untoward results in the instant case, which would have been avoided by the transfer of the bankruptcy case to the court in which the prior receivership proceeding was pending. The court of appeals held, nevertheless, that the Illinois court had no power to transfer the bankruptcy proceeding to Ohio, reasoning that the district court in Ohio did not become a court of bankruptcy until a petition in bankruptcy had been filed (R. 556). It held further that if the cause was removable, the district court had discretion in the matter and that no abuse of discretion had been shown (R. 556). We believe (a) that the power to transfer exists regardless of the pendency of other bankruptcy proceedings, and (b) that in the circumstances of this case the Illinois court had no discretion but to transfer the proceeding to Ohio.

a. Section 2a (19) of the Bankruptcy Act gives courts of bankruptcy jurisdiction to "transfer cases to other courts of bankruptcy." *Supra,* pp. 4–5. Unless "courts of bankruptcy" must be interpreted to mean other courts in which a bankruptcy proceeding has already been commenced, as held by the court below, Section 2a (19) seems

plainly to authorize the transfer of a bankruptcy proceeding to any court of bankruptcy jurisdiction.

The Bankruptcy Act does not require the narrow interpretation of "courts of bankruptcy" adopted below. Section 1 (10) reads: "'Courts of bankruptcy' shall include the district courts of the United States * * *." Section 2 provides: "The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act." Under the statutory language, therefore, a district court does not become a "court of bankruptcy" only when a bankruptcy proceeding is instituted, but it is a court of bankruptcy at all times. Cf. *Clark Bros. Co.* v. *Portex Oil Co.*, 113 F. 2d 45 (C. A. 9).[4] The normal effect of this language was recognized by the court below when it acknowledged that under Section 118 of the Bankruptcy Act, 11 U. S. C. 518, which permits the transfer of Chapter X (reorganization) proceedings "to a court of bankruptcy in any

[4] In *Babbitt* v. *Dutcher*, 216 U. S. 102, it was held, in the absence of specific statutory provision for ancillary proceedings, that such ancillary proceedings could be maintained in a district court in which no bankruptcy proceeding was pending, on the theory that all district courts are "courts of bankruptcy."

other district," a transfer could be effected to a court in which no bankruptcy petition was pending (R. 556). Other courts of appeals have given the same effect to the language of Section 118. *Porta* v. *Watts*, 109 F. 2d 966 (C. A. 10); cf. *Clark Bros. Co.* v. *Portex Oil Co., supra.* No reason in policy or history can be shown to argue for a different result under the almost identical language of Section 2a (19).

It is not necessary, as held by the court below (R. 556), that the motion for a transfer come within the purview of Section 32, 11 U. S. C. 55, and General Order in Bankruptcy No. 6, which merely prescribe the standards to be used in determining whether or not there should be a transfer where there are bankruptcy proceedings pending in two or more courts. These provisions do not cover a case where there is not a second proceeding pending, nor do they purport to preclude a court from ordering a transfer in such circumstances. Both Section 32 and Section 2a (19) were in the Bankruptcy Act as it was enacted in 1898. There is no indication in the statute that Section 32 was intended to limit Section 2a (19) and, so far as we can determine, it has never been so held by the courts. The cases cited by the court below (R. 556) dealt only with situations involving the pendency of more than one petition in bankruptcy.

Moreover, the restricted interpretation of Section 2a (19) would be contrary to the policy of

Congress, expressed in 28 U. S. C. 1404 (a), that "any civil action" may be transferred to any other district court in which the action could have been brought, provided only that the transfer will serve the "convenience of the parties and witnesses." *Ex Parte Collett,* 337 U. S. 55. Regardless of whether or not a bankruptcy proceeding is technically within the scope of 28 U. S. C. 1404 (a), it would be anomalous if non-bankruptcy civil actions were more freely transferable than proceedings in bankruptcy where, historically, the courts have been given unusual powers to better dispose of all claims in a single proceeding. Cf. *U. S. Fidelity Co.* v. *Bray,* 225 U. S. 205; *In re Watts and Sachs,* 190 U. S. 1.

b. If the power to transfer existed, the Illinois court was plainly required, in the circumstances of this case, to transfer to the Ohio court. The principal place of business, all the assets, and the books and records of the debtor corporation are within the Southern District of Ohio. The plaintiff in the Ohio case, R. F. C., is owed more than $36,000,000 by the debtor corporation. The district court in Ohio was completely familiar with all aspects of the case and had been in daily contact with its progress for almost four months before the bankruptcy proceeding was commenced. The Ohio receiver had been acting for almost three months and had all but completed his task when he was enjoined

from taking any further action. On the other hand, the only contact of the debtor with Illinois is that that state is its domicile. So far as appears, there are no assets in Illinois and presumably the Illinois trustees will have to do much of their work in Ohio. The three creditors who initiated the Illinois proceeding held claims of less than $5,000. Moreover, only one of the three creditors in the Illinois proceeding is a resident of Illinois, and there would seem to be no justifiable reason for their not bringing the proceeding in the Ohio court.

In short, every consideration of equity and convenience to the parties and witnesses favored transfer to the Ohio court. If creditors can, by filing a bankruptcy petition in another district, achieve the ousting of the district court from jurisdiction regardless of the stage of a non-bankruptcy proceeding in that court, there will inevitably be duplication, delay and confusion in an area where the emphasis has always been on efficient and orderly administration. Unless transfer is required, the Illinois court must now start from the beginning to familiarize itself with the case and administer the debtor's estate. The Illinois trustee must do again all the work of the Ohio receiver under the additional handicap that all the assets are in Ohio. All this waste effort could be avoided by transfer of the proceeding to the Ohio court.

To permit such wasteful practices would be inconsistent with the results reached by other courts in bankruptcy matters. In *Porta* v. *Watts,* 109 F. 2d 966 (C. A. 10), it was held an abuse of discretion for a district court not to transfer a reorganization proceeding to another district court in which a receivership proceeding was pending where the principal office, the records, the bank account, and the residence of the managing trustee were all located. In *Park Lane Dresses* v. *Houghton & Dutton Co.,* 54 F. 2d 33, 38 (C. A. 1), the dismissal of a bankruptcy proceeding to prevent interference with a state court receivership was upheld, where, as here, the receiver was on "the point of disposing of its assets and distributing the proceeds." Transfer of bankruptcy to the receivership court would, of course, achieve the same result. See also *Bank of Dillon* v. *Murchison,* 213 Fed. 147, 150 (C. A. 4); *In re Morosco Holding Co.,* 296 Fed. 516, 522 (S. D. N. Y.). Had the Ohio action been a bankruptcy proceeding, the transfer would clearly be required under Section 32 of the Bankruptcy Act, 11 U. S. C. 55, and General Order No. 6. *Royal Indemnity Co.* v. *American Bond and Mortgage Co.,* 65 F. 2d 455 (C. A. 1), certiorari denied, 290 U. S. 680. It seems likely that the result would be the same under 28 U. S. C. 1404 (a), in the case of any other civil action. See *Ford Motor Co.* v. *Ryan,* 182 F. 2d 329, 331–332 (C. A. 2), certiorari denied,

340 U. S. 851. And even before that provision was inserted in Title 28, effect was given to similar considerations under the doctrine of *forum non conveniens*. *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501; *Koster* v. *Lumbermen's Mutual Casualty Co.,* 330 U. S. 518.

There is, further, a special factor making incongruous the retention of bankruptcy jurisdiction in the Illinois court. All of the property and records of the debtor are outside the territorial limits of that court's jurisdiction. Adverse claims exist with respect to virtually all of the property, particularly in view of the confirmation of the judicial sales by the Ohio court. Despite R. F. C.'s participation in the bankruptcy proceeding, for the reasons indicated below in Point 3 the Illinois court could take no jurisdiction of the mortgaged property. Any rights claimed in the mortgaged assets would have to be asserted in the Ohio court. Moreover, ancillary proceedings in bankruptcy would probably be necessary to take custody of the books and records as well as the other property which might ultimately be determined to belong to the bankrupt. *Babbitt* v. *Dutcher,* 216 U. S. 102; *Acme Harvester Co.* v. *Beekman Lum. Co.,* 222 U. S. 300; *Noll* v. *Hodgson,* 70 F. 2d 19 (C. A. 4); *Guaranty Trust Co. of New York* v. *Daniel,* 49 F. 2d 866 (C. A. 8), affirmed, 285 U. S. 154. The appropriate court for the exercise of ancillary bankruptcy jurisdiction is obviously the

Ohio court in which the receivership is pending. *Babbitt* v. *Dutcher, supra; Acme Harvester Co.* v. *Beekman Lum. Co., supra.* The anomaly of ousting the Ohio court of its receivership jurisdiction, refusing to transfer to it the bankruptcy proceeding, and then vesting it with ancillary jurisdiction under which it might be required to perform a considerable portion of the administration of the bankrupt estate, is self-evident.

3. To the extent that the decision of the court below affirms the stay by the Illinois court of the proceedings in Ohio for the foreclosure of liens, it is in conflict with long-standing decisions of this Court and with numerous decisions of other courts of appeals. As early as *Peck* v. *Jenness,* 7 How. 612, and *Eyster* v. *Gaff,* 91 U. S. 521, this Court held, under earlier acts, that a bankruptcy court could not interfere with existing proceedings in another court to enforce a lien, and that an adjudication in bankruptcy did not affect pending foreclosure proceedings. In *Metcalf* v. *Barker,* 187 U. S. 165, the bankruptcy court was expressly held without power, under the Bankruptcy Act of 1898, to enjoin enforcement of a lien acquired more than four months prior to the filing of the bankruptcy petition. See also *Pickens* v. *Roy,* 187 U. S. 177. In *Straton* v. *New,* 283 U. S. 318, the Court reviewed the many decisions and stated that "the federal courts have with practical unanimity held that where a judg-

ment which constitutes a lien on the debtor's real estate is recovered more than four months prior to the filing of the petition, the bankruptcy court is without jurisdiction to enjoin the prosecution of the creditor's action, instituted prior to the filing of a petition in bankruptcy" (pp. 326–327). The opinion makes clear that this rule is applicable to liens however acquired (pp. 331–332). The continued vitality of this doctrine to the present day, despite changes in the Bankruptcy Act, was settled in *Emil* v. *Hanley,* 318 U. S. 515, when the Court restated the well-established rule that "where the lien survived bankruptcy, prior proceedings to enforce it would not be enjoined by the bankruptcy court" and held there was no evidence of any congressional intention to change this rule. The various courts of appeals have so understood and applied the rule, since the 1938 amendments. *Town of Agawam* v. *Connors,* 159 F. 2d 360 (C. A. 1), certiorari denied, 330 U. S. 845; *Ross* v. *Carey,* 174 F. 2d 872 (C. A. 5); *Muffler* v. *Petticrew Real Estate Co.,* 132 F. 2d 479 (C. A. 6), certiorari denied, 319 U. S. 766.

The court below based its decision on broad generalizations about the exclusiveness of bankruptcy jurisdiction which have never been held applicable to proceedings in other courts for the enforcement of liens. It also relied upon decisions involving lien foreclosure proceedings which were unlike the present case either because

the proceeding was commenced after bankruptcy or because the lien was acquired within four months of bankruptcy and was therefore invalidated by bankruptcy as an invalid preference.[5] The suggestion that a stay of the Ohio proceedings was at least proper in order to permit the Illinois court to inquire into the validity of R. F. C.'s mortgage lien is also without support, and in conflict with the governing law.[6] This Court's decisions clearly indicate that it is not for the bankruptcy court but for the foreclosure court to determine the validity of liens. *Peck* v. *Jenness, supra;* see *Metcalf* v. *Barker, supra* at 175; *Eyster* v. *Gaff, supra* at 524. The correct procedure is for the officer of the bankruptcy court to appear and assert any defenses he may have in the foreclosure proceeding, including an attack on the mortgage. See *Eyster* v. *Gaff,* 91 U. S. at 524, 525; *Straton* v. *New,* 283 U. S. at 326–327; *Emil* v. *Hanley,* 318 U. S. at 519; Glenn, *Liquidation* (1935), Sec. 242, p. 372. The decisions of other courts of appeals are to the same effect. *Dannel* v. *Wilson-Weesner-Wil-*

[5] There can be no question that the R. F. C. liens were acquired more than four months prior to bankruptcy, and that the Ohio foreclosure proceedings were begun some months before the filing of the bankruptcy petition. *Supra,* pp. 6–7.

[6] The injunction of the bankruptcy court which was affirmed by the court below was specifically made effective until the further order of the court (R. 204), and there is no limitation of its purpose to that suggested by the court below.

kinson Co., 109 F. 2d 364 (C. A. 6); *Town of Agawam* v. *Connors, supra; Bryan* v. *Speakman*, 53 F. 2d 463, 465–6 (C. A. 5), certiorari denied, 285 U. S. 539; *In re White Star Refining Co.*, 74 F. 2d 269 (C. A. 5), certiorari denied, 294 U. S. 727; *Hoehn* v. *McIntosh*, 110 F. 2d 199 (C. A. 6). None of the many cases dealing with the relationship between the bankruptcy and foreclosure courts suggest the possibility of a stay while the trustee in bankruptcy conducts an investigation, and their reasoning does not permit such a result. Similarly, the intimation of the court below that the Ohio proceedings could be entirely stayed because the receivership extended to all of Lustron's property is at odds with the decisions in other circuits. Whether or not there is a receivership in a foreclosure proceeding which extends beyond the property subject to the lien, the bankruptcy court acquires no greater power to deal with the assets impressed with the lien. It cannot enjoin or stay that portion of the other suit which seeks merely to foreclose the lien. *In re White Star Refining Co.*, 74 F. 2d 269, 271 (C. A. 5), certiorari denied, 294 U. S. 727; *In re Conservative Mortgage and Guaranty Co.*, 24 F. 2d 38 (C. A. 6).[7]

[7] In the event this petition is granted, the petitioner will also urge that it is now the owner of the mortgaged property for the reasons that the injunction of the Illinois court was invalid for failing to meet certain procedural and jurisdictional requirements, and that the unappealed confirmation decree of the Ohio court was *res judicata*.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 507

RECONSTRUCTION FINANCE CORPORATION,
Petitioner,

vs.

LUSTRON CORPORATION, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 184 F. (2d) 789. The opinion is also printed in full in the record (R. 549-557).

JURISDICTION.

The judgments of the Court of Appeals for the Seventh Circuit were entered October 23, 1950 (R. 558, 559). The petition for a writ of certiorari was filed on January 19, 1951. The jurisdiction of this court is invoked by petitioner under Title 28, U. S. C. section 1254(1).

QUESTIONS PRESENTED.

(a) Whether a bankruptcy court has the power to transfer an ordinary bankruptcy proceeding to another United States District Court where no petition in bankruptcy involving the bankrupt is pending; and even if a bankruptcy court has such power, whether the bankruptcy court should be required under the circumstances of this case, to transfer the bankruptcy proceeding to the Ohio Court.

(b) Whether a bankruptcy court may temporarily restrain a plaintiff in a proceeding in a non-bankruptcy court to enforce alleged liens upon the bankrupt's property antedating bankruptcy by more than four months, from seeking confirmation of a sale of the liened property and from taking possession thereof, where the validity of the liens is challenged by the receivers in bankruptcy and the bankruptcy court, without assuming jurisdiction over the liened property, enters such restraining order without seeking to adjudicate the validity of the liens or to divest the nonbankruptcy court of its jurisdiction but only for the purpose of giving the trustees in bankruptcy, later to be elected, a reasonable opportunity to inquire into the validity of the claimed liens.

STATUTES INVOLVED.

Section 2 of the Bankruptcy Act (11 U. S. C. 11) provides as follows:

> a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—
>
> * * * * *
>
> (19) Transfer cases to other courts of bankruptcy;
>
> * * * * *

Section 32 of the Bankruptcy Act (11 U. S. C. 55) provides as follows:

> Transfer of Cases. In the event petitions are filed by or against the same person or by or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall, by order of the court first acquiring jurisdiction, be transferred to and consolidated in the court which can proceed with the same for the greatest convenience of the parties in interest.

28 U. S. C. 1404 (a) provides as follows:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE.

The respondents deem it advisable to make a restatement of the case because the statement of the petitioner is inaccurate and incomplete.

On February 21, 1950, the Reconstruction Finance Corporation filed a complaint in the United States District Court for the Southern District of Ohio, Eastern Division (hereinafter referred to as "Ohio Court"), (R. 288-313) in which it sought, first, judgment upon an alleged indebtedness of Lustron Corporation, an Illinois corporation, second, foreclosure of alleged liens on property owned by Lustron, third, receivership in equity to marshall and distribute all other assets of Lustron under the direction of the court, on the ground that the corporation was insolvent (R. 309, 311).

On March 6 the Ohio Court entered a money judgment against Lustron (R. 314) and appointed a receiver of Lustron and of all its assets wherever situated (R. 315) and enjoined all creditors of Lustron from taking any action against Lustron or its assets (R. 317, 318). No provision was made for creditors of Lustron to intervene or to file claims in the Ohio proceeding.

On March 30 the Ohio Court entered a foreclosure decree, as of March 6, with respect to the mortgaged property (R. 321).

On March 14 the Ohio receiver, pursuant to the provisions of 28 U. S. C. 754, filed in the United States District Court for the Northern District of Illinois, Eastern Division, a copy of the complaint and of the order appointing him as receiver in the Ohio proceeding (R. 23). The purpose of this proceeding in accordance with Section

754 was to vest title and possession in the receiver of all of Lustron's property in the Northern District of Illinois.

On May 5, the Ohio Court entered an order directing the United States Marshal to sell the mortgaged property at public auction on June 6, at 11:00 A. M. (R. 341-353). There was no appraisal of the property. The mortgaged property was sold to R. F. C. for $6,000,000 (R. 364). Immediately after the sale, on June 6, R. F. C. filed its motion returnable on June 9 for confirmation of the sale of the mortgaged property (R. 286). On June 8 Lustron filed its motion in the Ohio Court for an order denying confirmation (R. 286).

On June 8, two days following the Marshal's sale, three creditors of Lustron, the *bona fides* of whose claims are not challenged, filed a petition in bankruptcy against Lustron in the United States District Court for the Northern District of Illinois, Eastern Division (hereinafter referred to as "Illinois Court") (R. 2). On the same day the petitioning creditors presented their sworn petition for the appointment of a receiver and for an order restraining R. F. C. from taking any further action in connection with the Ohio proceeding and restraining the Ohio receiver from taking any action in relation to the assets of the bankrupt estate or in the administration of the Ohio receivership (R. 9-10). The petition challenged the validity of the mortgages and alleged *inter alia* that the cost of the mortgaged assets to Lustron was $14,000,000. The petition alleged also that there was insufficient time, in view of the impending confirmation of the sale, to serve notice prior to the entry of the order. The Illinois Court thereupon, on June 8, 1950, entered the temporary restraining order enjoining R. F. C. and the Ohio receiver from taking any further action in the administration of the receivership and from seeking the entry of any order confirming the sale until the further order of that court (R. 11-13).

On June 9, counsel for R. F. C. and the Ohio receiver were served with copies of the temporary restraining order (R. 20). The Ohio Court was informed of the entry of the order (R. 20). On the same day Judge Underwood of the Ohio Court telephoned Judge Sullivan of the Illinois Court and Judge Sullivan advised Judge Underwood that he issued the order of June 8 to "restrain that sale * * * until we found out more about it" (R. 199).

On June 12 R. F. C. filed its motion for dissolution of the temporary restraining order (R. 16), which was resisted by the receivers in bankruptcy who charged that the R. F. C. mortgages were invalid for the reasons (a) that they were contrary to the statutes and laws of Illinois and Ohio; (b) that they did not sufficiently identify the property and attempted to subject "after acquired" property to the alleged lien; and (c) that they were for periods of time beyond that permitted by the laws of Illinois and Ohio (R. 161). The motion for dissolution was denied by the Referee in Bankruptcy after hearing (R. 200) and affirmed by the District Judge (R. 515-517). On June 12 the Ohio Court, without ruling on the Lustron motion to deny confirmation, entered an order confirming the Marshal's sale (R. 365).

On June 13 the Illinois Court adjudged Lustron a bankrupt (R. 129). Counsel for R. F. C. stated that it "was not opposing the petition for adjudication" (R. 31). On the same day R. F. C. moved to transfer the cause to the Ohio Court (R. 26), which motion was subsequently renewed (R. 143). The several motions for transfer were denied (R. 128, 196), for the reason that no petition in bankruptcy was pending in the Ohio Court and R. F. C.'s motion was not within the purview of Section 32 of the Bankruptcy Act.

Following the receipt of information that the Ohio Court had entered an order confirming the sale of the mortgaged

property, the Illinois Court, upon the petition of its receivers, on June 14 entered a further restraining order enjoining R. F. C. from taking possession of the property until the further order of the Illinois Court (R. 135-136).

On June 16 the Illinois Court entered an order extending the restraining order of June 8 to June 28 (R. 140), and thereafter on June 28 extended it to June 30 (R. 197), and on June 30, entered an order continuing the restraining order "until the further order of the court" (R. 203-204).

On June 16 the Ohio Court ordered the Marshal to deliver the mortgaged property to R. F. C. (R. 372). On the same day the Marshal executed the order (R. 373).

On June 30, within 17 days of the order of adjudication in bankruptcy, trustees were elected (R. 510) at the first meeting of creditors. R. F. C. moved the court for a stay of the first meeting or, in the alternative, that the election of trustees be deferred (R. 464-467; 278-279). The motion was denied (R. 509-510, 279, 280).

Subsequent to R. F. C.'s several motions to transfer the bankruptcy proceeding to the Ohio Court, R. F. C. filed its claim in the Illinois bankruptcy proceeding (R. 468).

During the pendency of the appeal, the Court of Appeals pursuant to R. F. C.'s emergency motion, on August 1, modified the restraints on the Ohio receiver (R. 547-548). This order permitted the Ohio receiver, subject to the orders of the Ohio Court and to such accounting as may be required by law, to conserve the property in his possession (this being the unencumbered property of Lustron), to pay salaries, to ship houses already paid for, collect accounts, to maintain records and to retain and replace employees necessary to perform and to fulfill the purposes of the order. The order also restrained the trustees, without prejudice to any party and until further order of the

Court, from taking possession of the property or records of Lustron.

On appeal, the Court of Appeals affirmed the Illinois injunctional order as modified and the order refusing transfer and remanded to the Illinois Court the disposition of the modifying order of August 1 (R. 557).

The Court of Appeals held that the Illinois Court had power under the circumstances of the case temporarily to stay the enforcement of the liens of R. F. C. pending reasonable opportunity to the trustees to investigate the validity of such claimed liens. The Court of Appeals upheld the order denying transfer to the Ohio Court for the reason that the bankruptcy court had no power to transfer an ordinary bankruptcy proceeding to a district court in which no bankruptcy proceeding involving the bankrupt is pending, and that if the power to transfer existed there was no abuse of discretion under the circumstances of this case in refusing to make the transfer (R. 555-556).

SUMMARY OF ARGUMENT.

I. A bankruptcy court has no power to transfer an ordinary bankruptcy proceeding to another District Court where there is no pending petition in bankruptcy by or against the bankrupt; and even if such power existed there is no showing, in the record of this case, that the bankruptcy court abused its discretion in refusing to order a transfer.

II. The court below had the power temporarily to restrain the petitioner from seeking confirmation in the Ohio Court of the sale of the mortgaged assets and taking possession thereof, under the circumstances of this case.

III. There is no conflict between the orders of the Illinois and Ohio Courts which requires the exercise of the supervisory jurisdiction of this Court.

ARGUMENT.

I.

A District Court Has No Power to Transfer an Ordinary Bankruptcy Proceeding to Another District Court Where There Is No Petition in Bankruptcy Pending by or Against the Bankrupt.

The petitioner contends (a) that an ordinary bankruptcy proceeding may be transferred to another District Court where no petition in bankruptcy is pending and (b) that in the circumstances of this case the Illinois Court abused its discretion in refusing to transfer the proceeding to Ohio.

(a). The only bankruptcy proceeding involving Lustron is the proceeding in the Illinois Court, which is an ordinary bankruptcy. The Ohio proceeding is not a bankruptcy proceeding. The validity of the bankruptcy proceeding in the Illinois Court is unchallenged; petitioner did not, nor does it now, object to the jurisdiction of the Illinois court to adjudicate Lustron a bankrupt (R. 31). In fact, after it had moved to transfer the bankruptcy proceeding to the Ohio Court and its motion was denied, the petitioner filed its claim in the bankruptcy proceeding for the indebtedness due it from Lustron.

The Illinois court denied petitioner's motion to transfer the bankruptcy proceeding to the Ohio Court for the reason (R. 196), that, as there was only one bankruptcy petition involving Lustron, a transfer could not be made under Section 32 of the Bankruptcy Act (11 U. S. C. 55), *supra*, p. 3. Section 2a (19) (11 U. S. C. 11a (19)) *supra* p. 3 and Section 32 are the only sections of the Bankruptcy

Act relating to transfers of ordinary bankruptcies. Those sections are supplemented by General Order in Bankruptcy No. 6 (U. S. C. Title 11 foll. Section 53).

Although Section 2a (19) has remained unchanged as enacted in 1898 (1 Collier on Bankruptcy, 14th Ed., 1940, page 317), petitioner has not cited a single authority, court decision or text writer, to support its contention that an ordinary bankruptcy proceeding may be transferred to a court in which no bankruptcy petition involving the bankrupt is pending. Whenever the question has been raised the courts have uniformly held that there must be a valid petition pending in the court to which transfer is sought.

In *Royal Indemnity Company, et al.* v. *American Bond & Mortgage Co.*, 289 U. S. 165, this court was called upon to determine whether the United States District Court for Northern Illinois had jurisdiction in a bankruptcy proceeding involving American Bond & Mortgage Co. That issue was important for the reason only that unless a valid petition were pending in Illinois, bankruptcy proceedings pending in the United States District Court of Maine against the same company could not be transferred to the Illinois court. This court stated as follows at page 169:

> "That Congress was mindful of this" (considerations of convenience of creditors) "is evident from the provisions of transfer of a cause by one court of bankruptcy to another where a proceeding is pending against the same bankrupt, for the greater convenience of the parties in interest. We should therefore construe the language of the act so as to effectuate the evident purpose of the legislation, and not so narrowly as to defeat the true intent of Congress. We hold that the District Court for the Northern District of Illinois, in respect of respondent's principal place of business, had jurisdiction to entertain the petition."

The United States District Court of Maine in *In re American Bond & Mortgage Co.*, 58 F. (2d) 379, affirmed *sub nom. Royal Indemnity Co.* v. *American Bond & Mortgage Co.* (C. A. 1, 1933), 65 F. (2d) 455, certiorari denied, 290 U. S. 680, held that a valid petition must be pending in the court to which a bankruptcy proceeding is sought to be transferred.

Although a petition was pending in the court to which transfer was sought in the *American Bond & Mortgage Co.* cases, the question in each case was whether the petition was a valid pending petition for otherwise the transfer could not be made; and so, petitioner does not, by its statement at page 23 of its petition that "the cases cited by the court below dealt only with situations involving the pendency of more than one petition in bankruptcy," advance a valid reason why the decisions in the *American Bond & Mortgage Co.* cases are not applicable in the instant case.

Cases prior to the decisions in the *American Bond & Mortgage Co.* cases similarly construe the provisions of the Bankruptcy Act relating to transfer of ordinary bankruptcy proceedings. *In re Schenectady Engineering and Construction Co.* (N. D. N. Y. 1906), 147 F. 868, 870; *In re Waxelbaum* (S. D. N. Y. 1899), 98 F. 589.

The leading text writers on bankruptcy with equal unanimity support the construction placed on the transfer provisions of the Bankruptcy Act by the courts. Thus, both Collier and Remington take the position that Sections 2a (19) and 32 should be read together and that a petition in bankruptcy must be pending in the district to which transfer is requested. 1 Collier on Bankruptcy (14th Ed., 1940) 317; 2 Collier on Bankruptcy (14th Ed., 1940) 1317; 8 Collier on Bankruptcy (14th Ed., 1940) 293, 298; 1 Remington on Bankruptcy (5th Ed., 1950) 329.

Petitioner at page 17 of its petition declares that the decision below interprets an important provision of the Bankruptcy Act in respect of transfer of cases in a manner incompatible with the statute's language and inharmoniously with interpretation by another Court of Appeals of a comparable provision of the Act. Insofar as the language of the statute is concerned, this court has construed the Act contrary to petitioner's contention; and no Court of Appeals has held that a transfer of an ordinary bankruptcy proceeeding can be made to another Court in which no petition in bankruptcy is pending. Petitioner refers to *Porta* v. *Watts,* 109 F. (2d) 966 and *Clark Brothers Co.* v. *Portex Oil Co.,* 112 F. (2d) 45, but these cases do not deal with ordinary bankruptcy but relate to reorganization proceedings, the transfer of which is expressly authorized by Section 118 of the Bankruptcy Act (11 U. S. C. 518).

Section 118, which by its express terms is limited to Chapter X proceedings, permits a transfer where only one petition is pending. However, Section 118 is not a comparable transfer provision because under that section a transfer is authorized to *any* other district court which, obviously, cannot be done in ordinary bankruptcies. Furthermore, Section 126 of the Bankruptcy Act (11 U. S. C. 526) provides that only one petition may be filed for the relief offered by Chapter X unlike the situation in ordinary bankruptcy where more than one petition may be filed. The liberality of transfer under Chapter X was required in view of the limitation against the filing of more than one petition but this liberality was not extended by the Congress to ordinary bankruptcy, where more than one petition may be filed.

If petitioner is contending at pages 23 and 24 of its petition that Section 1404 (a) of Title 28 U. S. C., *supra* p. 3 is authority for the power of the Illinois Court to

transfer the bankruptcy proceeding to the Ohio Court, then its contention must fail because a bankruptcy proceeding is not within the purview of that section.

The cases which may be transferred pursuant to Section 1404 (a) are "civil actions." The reviser's notes to the many sections of Title 28 dealing with jurisdiction and venue in district courts (sections 1331-1406) containing the term "civil action" state that it is used "in view of rule 2 of the Federal Rules of Civil Procedure." The civil action referred to in the Judicial Code is the civil action which comes within the purview of the Federal rules (Fed. Rules Civ. Proc., Rule 2, 28 U. S. C.). Proceedings in bankruptcy are not civil actions. The actions which were to be encompassed by the Federal rules are clearly set forth in the June 3, 1935 order of this court, 295 U. S. 774:

> "It is ordered:
>
> 1. Pursuant to Section 2 of the Act of June 19, 1934, c. 651, 48 Stat. 1064, the Court will undertake the preparation of a unified system of general rules for cases in equity and actions at law in the District Courts of the United States and in the Supreme Court of the District of Columbia, so as to secure one form of civil action and procedure for both classes of cases, * * *."

Thus, cases in equity and actions at law are embraced in the term "civil action." Bankruptcy proceedings are not actions at law. *Meek* v. *Centre County Banking Co.*, 268 U. S. 426, 429; 1 Collier on Bankruptcy (14th Ed., 1940) 161. Nor is a bankruptcy proceeding "a suit in equity either by statutory definition or in common understanding," *Columbia G. & E. Corp.* v. *American Fuel & P. Co.*, 322 U. S. 379, 389. A bankruptcy proceeding is *sui generis*.

Prof. James William Moore, editor in chief of Collier on Bankruptcy (14th Ed.), and special consultant on the

revision of the judicial code, testified before Subcommittee 1 of the House Judiciary Committee, Title 28 U. S. C. Congressional Service, 80th Congress, 2nd session at page 1969 stating:

> "And section 1404 introduces an element of convenience which gives the court the power to transfer a case for the convenience of parties and witnesses to another district. Both of these changes were in line with modern State practice; and the provision for change of venue on the grounds of convenience is also embodied in the Bankruptcy Act for corporate reorganization, section 118, Eleventh United States Code, section 518."

The power now granted to district courts to transfer causes was, as Prof. Moore points out, always contained in the Bankruptcy Act, but limited, in the case of single petitions, to proceedings for corporate reorganizations under Chapter X. The Bankruptcy Act since 1898 has not only contained its own venue provisions, but in cases of ordinary bankruptcies has provided for transfer of proceedings, but only to a district where a petition is pending.

(b). Upon the assumption that the Illinois Court did have the power to transfer the bankruptcy proceeding to Ohio, the petitioner argues that the Illinois Court abused its discretion in refusing to transfer the cause to the Ohio Court since, according to petitioner, the Ohio receiver "had all but completed his task," the Ohio Court was familiar with the case and the principal place of business and the assets of the bankrupt were in Ohio.

If it be assumed, *arguendo*, that the Illinois Court had the power to transfer, it is respondents' contention that there was no manifest abuse of discretion in refusing to transfer. Petitioner did not show what creditors, if any, there were in Ohio and, as far as the record discloses, the only claimant who filed its claim in the Ohio proceeding was

the State of Alabama (R. 285). Petitioner of course has an office in Chicago, Illinois.

The Ohio proceeding was far from completion. The proceeding was instituted within four months of the filing of the petition in bankruptcy and, while the foreclosure had proceeded to a sale, the general equity receivership embracing the unencumbered assets of Lustron had in reality only commenced, for no provision had been made for filing of claims. That phase of the proceeding dealing with the foreclosure was only temporarily interrupted by the Illinois Court's order, for the Illinois Court did not seek to divest the Ohio Court of its jurisdiction to complete the proceeding with respect to the mortgaged property. The Illinois Court asserted its paramount and exclusive jurisdiction only in respect of the general equity phase of the Ohio proceeding involving the unencumbered assets of Lustron. This was not only the Illinois Court's right but its duty. *Taylor* v. *Sternberg,* 293 U. S. 470, 473; *In re Diamond's Estate,* 259 F. 70.

It is quite apparent that at the time the receivership was instituted in Ohio all of the assets of Lustron were not located within the jurisdiction of the Ohio Court; otherwise, the Ohio receiver would not have filed the proceeding in the Illinois Court under 28 U. S. C. 754. Moreover, the primary contracts for the loans to Lustron, upon which petitioner pursued foreclosure in the Ohio Court, were executed in Illinois (R. 26, 478), and the document of petitioner providing for a change in the amortization requirements of petitioner's loan to the bankrupt described the latter as "Lustron Corporation, Chicago, Ill." (R. 476).

If the power to transfer had existed, the question that would arise is whether the criterion to be followed is "the convenience of the parties," as provided in Section 32 of the Bankruptcy Act, or, as petitioner apparently urges

"the convenience of parties and witnesses, in the interests of justice" as provided in Section 1404 (a) of the Judicial Code. The burden in either case would be on petitioner to establish by a preponderance of the evidence that the transfer was required. *Ford Motor Company* v. *Ryan,* 182 F. (2d) 329, certiorari denied, 340 U. S. 851; *In re Republic Gas Corporation,* 6 F. Supp. 70. The petitioner did not sustain that burden. The bankrupt and its trustees oppose transfer, the petitioning creditors oppose it and no other creditor has joined with petitioner in its motion. The petitioning creditors' choice of forum is a factor entitled to great weight. *Ford Motor Co.* v. *Ryan,* 182 F. (2d) 329, certiorari denied, 340 U. S. 851.

The two principal cases relied upon by petitioner at page 26 of its petition are neither controlling nor persuasive. *Porta* v. *Watts* (C. A. 10), 109 F. (2d) 966, on its facts is not applicable. Furthermore that case involved a reorganization proceeding which required the operation of the debtor's business, whereas the case at bar is an ordinary bankruptcy. In *Park Lane Dresses* v. *Houghton & Dutton Co.* (C. A. 1), 54 F. (2d) 33, bankruptcy proceedings were dismissed because there was no estate for the court to administer.

Petitioner misconceives the purpose of ancillary proceedings in bankruptcy in suggesting at pages 27 and 28 of its petition that such proceedings would be required in the Ohio Court. Insofar as the mortgaged assets are concerned, the Illinois Court did not rule that its jurisdiction supersedes that of the Ohio Court. The only assets now involved in the bankruptcy estate are the unencumbered assets of Lustron and its books and records, all in the possession of the Ohio receiver. He holds that property as a mere repository for the bankruptcy court and not adversely. *Taylor* v. *Sternberg,* 293 U. S. 470, 473; *In re Watts,* 190 U. S. 1, 27. The petitioner did not nor does it

now object to the bankruptcy court's paramount and exclusive jurisdiction over the unencumbered assets of Lustron in the possession of the Ohio receiver. The trustees in bankruptcy have title to the property and may deal with it wherever located and if necessary, sell it without resort to ancillary administration. *Robertson* v. *Howard,* 229 U. S. 254, 261. The only action the trustees need take in observance of the rule of comity is to appear in the Ohio Court and request that it direct its receiver to turn over the property in his possession. Such action is not an ancillary proceeding and in fact the trustees would not be submitting to the jurisdiction of the Ohio Court and would not be bound by any ruling adverse to them. *In re Diamond's Estate,* (C. A. 6), 259 F. 70, 75.

II.

The Court Below Had the Power Temporarily to Restrain the Petitioner From Seeking Confirmation in the Ohio Court of the Sale of the Mortgaged Assets and Taking Possession Thereof, Under the Circumstances of This Case.

As a reason for granting certiorari, petitioner urges at page 18 of its petition that the decision of the Court of Appeals conflicts with the decisions of this and other courts that a bankruptcy court cannot stay proceedings for the enforcement of liens antedating bankruptcy by more than four months. Petitioner misconceives the nature, extent and purpose of the restraining orders as they affect the foreclosure proceeding in the Ohio Court. The restraining orders do not permanently enjoin the Ohio proceeding; they do not attempt to secure to the Illinois Court the right to determine the validity of petitioner's liens; and they do not attempt to oust the Ohio Court of jurisdiction over the

encumbered property of the bankrupt. All the orders seek to accomplish is a temporary restraint of the Ohio proceeding so as to afford the trustees in bankruptcy a reasonable opportunity to investigate the validity of petitioner's liens which were charged to be invalid as against them. Only by the temporary restraint imposed by the Illinois Court's orders could the rights of the trustees and of the general creditors of the bankrupt be fully protected and secured. That such was the object of the temporary restraining orders is manifest by the Illinois Court's remarks (R. 199). The Court of Appeals similiarly construed the restraining orders (R. 555, 556).

This court held in *Steelman* v. *All Continent Corporation,* 301 U. S. 278, 288-291, that a court of bankruptcy can temporarily restrain a person from prosecuting an action involving ownership of assets, albeit the jurisdiction of the court in which the suit is pending is not challenged and the bankruptcy court does not claim paramount and exclusive jurisdiction over the assets involved. This court held that the *status quo* may be preserved to permit an investigation to be made to allow the trustees in bankruptcy to file a plenary suit. The court below in the case at bar granted nothing more than that which this court held proper in the foregoing case.

The jurisdiction to enter a restraining order, as in the instant case, and the propriety of such order have been sustained in *In re Jersey Island Packing Co.* (C. A. 9, 1905), 138 F. 625; *In re Conemaugh Coal Mining Corporation* (D. C. Pa., 1926), 18 F. (2d) 683, 684; *Beach* v. *Macon Grocery Co.* (C. A. 5), 116 F. 143; See also 5 Remington on Bankruptcy (4th Ed. 1936) Section 2499, page 849; 5 Remington on Bankruptcy (4th Ed. 1936) Section 2501, p. 851; 6 Am. Jur. (Rev. Ed. 1950) Bankruptcy, sec. 297, p. 727.

The cases cited by petitioner under Point 3, commencing

at page 28 of its petition, reiterate the well established rule that a bankruptcy court may not enjoin proceedings for the enforcement of liens antedating bankruptcy by more than four months and assume jurisdiction over the property. The court below did not attempt to exercise jurisdiction over the mortgaged assets or determine the validity of the mortgages, nor did it attempt to oust the Ohio Court of its jurisdiction. The restraining orders were for the purpose only, as the Court of Appeals stated (R. 555), to permit the trustees an opportunity to investigate the validity of the mortgages. The Court of Appeals suggested a procedure which the trustees might later pursue would be to intervene in the foreclosure proceeding. This is the procedure suggested by the petitioner at page 30. However unless the restraining orders were entered, all possibility of such action would have been lost to the trustees.

III.

There Is No Conflict Between the Orders of the Illinois and Ohio Courts Which Requires the Exercise of the Supervisory Jurisdiction of This Court.

The first of the reasons advanced by the petitioner for granting the writ is that there is an outstanding conflict between the orders of the Illinois and the Ohio Courts (Petition, p. 17). This reason has no relation to the questions presented by petitioner (Petition, p. 3). At most it is ancillary to the petitioner's third reason for granting the writ, namely that the decision conflicts with the decisions of this and other courts with respect to the power of a bankruptcy court to stay proceedings for the enforcement of liens antedating bankruptcy by more than four months. Therefore, if the Court of Appeals was correct in holding that the Illinois Court had the power temporarily to main-

tain the status of the Ohio proceeding (Point II of this brief), then the reason first urged by petitioner, that there is a conflict, must fail.

Furthermore, the reason advanced by petitioner why this Court should exercise its supervisory jurisdiction is fallacious because there is no conflict. It must be borne in mind that the Illinois Court did not attempt to restrain the Ohio Court. As the situation now exists, the June 14th order of the Ohio Court directing the Marshal to deliver custody and control of the mortgaged property to petitioner (R. 371) was fully executed on June 16th (R. 373). There is no outstanding unexecuted order of the Ohio Court. The property has not been plunged into a legal morass, as suggested by petitioner. Within a reasonable time the trustees in bankruptcy must act in respect of the claimed invalidity of the mortgages. If the trustees unduly delay, then the Illinois Court will, as suggested by the Court of Appeals, dissolve the restraining orders.

The argument of petitioner that the order of the Ohio Court stands unappealed is without merit, because neither the petitioning creditors nor the trustees in bankruptcy, respondents here, were parties to the proceeding in the Ohio Court and had no right of appeal from such order.

Conclusion.

The decision of the Court of Appeals is correct. It is based on the applicable decisions of this Court and the provisions of the Bankruptcy Act. This Court should not be burdened with a review of the orders here in question. The temporary restraining orders are interlocutory orders. The order refusing transfer, even if it could be said that the power to transfer existed, was an order, insofar as the record discloses, which affected only the claimed convenience of the petitioner. It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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